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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Review of the Pioneer's)
Preference Rules)

ET Docket No. 93-266

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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COMMENTS OF SATELLITE CD RADIO, INC.

Satellite CD Radio, Inc. (CD Radio), by its attorneys, hereby comments on the Commission's *Second Report and Order and Further Notice of Proposed Rulemaking (Report and Order)* in the above-captioned docket.¹ In this proceeding, the FCC generally is seeking comment on revising its pioneer's preference policies and rules in light of recent changes, including legislation authorizing competitive bidding. As discussed below, the pioneer's preference program is not only compatible with the competitive bidding process, it provides a useful means of recognizing the efforts of those entities who undertake the substantial risks of creating new and innovative radio services. In adapting the pioneer's preference policies to a competitive bidding era, however, CD Radio urges the Commission to restate and reaffirm that such preferences can be granted for regulatory as well as technical innovation. Further, the Commission should provide regulatory benefits for pioneers of services that do not involve mutually exclusive applications, and therefore are not subject to the auction process.

¹ FCC 95-80 (March 1, 1995).

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I. INTRODUCTION

A. CD Radio's Pioneer Preference Request

In 1990, CD Radio became a technical and a regulatory pioneer of the Satellite Digital Audio Radio Service (DARS). CD Radio was the first applicant for the service, and filed a petition for rulemaking to allocate necessary spectrum, which recently was granted.² Technically, CD Radio has designed a highly efficient, seamless service which utilizes an innovative satellite spatial and frequency diversity scheme to deliver multichannel CD quality music and voice nationwide. CD Radio has expended a great deal of time and resources designing a system which will overcome the blockage, fading, and multipath problems that have to date inhibited the creation of a commercially viable DARS system.

As a regulatory pioneer, CD Radio went beyond its initial filing³ and took the lead in locating and clearing spectrum for DARS by working with the FCC, NTIA, DOD and the relevant frequency coordinator to locate S-Band spectrum for this service. After locating this S-Band spectrum, CD Radio developed and deployed an experimental DARS system which conclusively demonstrated the viability of an S-Band satellite DARS.⁴ Over the last half-decade, CD Radio has spent almost \$20 million attempting to bring its technology to

² *Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, FCC 95-17 (Jan. 18, 1995).

³ *See* Petition for Rulemaking and Applications of Satellite CD Radio (filed May 18, 1990).

⁴ Supplement to Pioneer's Preference Request, PP-24 (filed June 2, 1993).

market, with much of this expenditure going to clear regulatory hurdles. Only now is success in sight.

Because its technical and regulatory trailblazing efforts fell squarely within the Commission's pioneer preference criteria, CD Radio filed for a pioneer's preference when it first tendered its application for a DARS license in 1990.⁵ CD Radio's request was further supplemented in 1993, after highly successful tests of its experimental S-Band system.⁶ CD Radio's pioneer's preference request has been ripe for nearly one and one-half years, and its application for nearly five years. Despite this, no action has been taken on these requests.

B. Impact of Auction Legislation on Pioneer's Preference Policies

The Omnibus Budget Reconciliation Act of 1993 authorized use of competitive bidding to award mutually exclusive licenses for radio services. On October 21, 1993, the Commission issued a *Notice of Proposed Rulemaking* in this proceeding,⁷ seeking comment on whether pioneer's preferences remained appropriate in the new competitive bidding environment. As noted by the Commission in this *Report and Order*,⁸ the record demonstrated that because pioneers had already incurred significant debt in developing their technology and gaining the proper spectrum allocation, without a pioneer's preference, such

⁵ Application of CD Radio, Inc., File Nos. 49/50-DSS-P/L-90 et al. (filed May 18, 1990); Supplement to Preference Request (filed Jan. 23, 1992). *See also Report and Order*, ¶ 36 n.46.

⁶ Supplement to Pioneer's Preference Request, PP-24 (filed June 2, 1993).

⁷ *Review of the Pioneer's Preference Rules*, 8 F.C.C. Rcd 7692 (1993).

⁸ *Report and Order*, ¶ 12.

pioneers would be placed at a disadvantage in any spectrum auction. As summarized by CD Radio, "absent a preference, a pioneer's efforts will be ignored by capital markets as funding flows to free riders that have ducked the early efforts. If anything, auctions will increase this perverse incentive, because it ties financing even more directly to licensing."⁹

CD Radio also noted that competitive bidding and pioneer's preferences address different -- and complementary -- policy goals in that auctions in mutually exclusive situations increases the efficiency with which initial license assignments are made while pioneer's preferences encourage private companies to seek improvements in the existing allocations.¹⁰ Thus, CD Radio and many other commenters supported maintaining pioneer's preferences even under competitive bidding to offset the expense and difficulty of securing new spectrum allocations and developing new service rules.

In the instant *Report and Order*, the Commission determined to retain the pioneer's preference program¹¹ and to make preferences available for either "new services or enhancements to existing services through the use of innovative technologies."¹² CD Radio applauds the Commission's decision to retain the pioneer's preference in competitive bidding situations as sound policy. However, in clarifying these proposals, the Commission should explicitly reiterate that pioneer's preferences exist not only to encourage and reward technological pioneers, but also to encourage and reward regulatory pioneers. In addition,

⁹ Comments of CD Radio at 10-11.

¹⁰ *Id.*

¹¹ *Report and Order*, ¶ 15.

¹² *Id.*, ¶ 29.

CD Radio urges the Commission to adopt some scheme for rewarding pioneers in services where mutual exclusivity is avoided by technical or other means.

II. THE COMMISSION'S RULES SHOULD ENCOURAGE REGULATORY PIONEERS AS WELL AS TECHNICAL PIONEERS

From the date the pioneer's preference program was first proposed, the Commission has always maintained that these preferences are intended to benefit regulatory as well as technical pioneers. In its initial *Notice* proposing the program,¹³ the Commission made plain its awareness that regulatory pioneers are handicapped by the Commission's spectrum allocation process: "[W]hen an innovator, especially a small entity, develops an idea for a new service, it cannot simply arrange for developmental funding and try its idea in the market. Rather, it must first request that the Commission allocate spectrum or change some technical standards . . . and then compete with other parties for a license."¹⁴

The Commission's intent to reward regulatory trailblazers was further evinced in the 1991 rulemaking which implemented the pioneer's preference program.¹⁵ In that order, the Commission stated that the program is not meant to encompass "the introduction of a new technology . . . unless [the] new technology is associated with a licensable service."¹⁶ Because virtually all new communications services have regulatory as well as technical

¹³ *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 5 F.C.C. Rcd 2766, 2766 (1989).

¹⁴ *Id.*

¹⁵ *Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 F.C.C. Rcd 3488 (1991).

¹⁶ *Id.* at 3492.

components, the pioneer's preference program must be intended to encourage both regulatory *and* technical innovations.

In its opening comments to the *Notice of Proposed Rulemaking* in this proceeding, CD Radio pointed out that the Commission must continue to award pioneer's preferences to regulatory trailblazers to serve the regulatory goals underlying the policies -- avoiding unjust devaluation of pioneers' investments by regulatory free riders. As noted by other commenters in that proceeding, one of the benefits of the preference policy is to place the entity which had expended resources obtaining the spectrum for the innovative technology on an even footing with other entities that sought licenses for their products after the spectrum had been allocated.¹⁷ Technical innovation is important, but not the exclusive basis for awarding a preference.¹⁸

Absent a preference, developers of new communications technologies and services will emerge from the regulatory process saddled with debt, and will therefore be unable to attract enough venture capital to bring their services to market. In the meanwhile, entities

¹⁷ See Comments of PCN America at 7-8; Comments of PCS-NY at 1-2; Comments of In-Flight Phone at 5; Comments of OMNIPOINT at 18-19; Comments of Associated Communications Corp. at 3.

¹⁸ In the instant *Report and Order*, the Commission states that "a necessary condition for the award of a preference is that the applicant demonstrate that it has developed the capabilities or possibilities of a new technology or service, or has brought the technology or service to a more advanced or effective state." *Report and Order*, ¶ 2. While CD Radio agrees that encouraging the creation of new and innovative technologies is *one* of the purposes of the pioneer's preference program, it also respectfully suggests that the program's purpose was never intended to be so limited. Specifically, another purpose of a pioneer's preference is to ensure that companies that incur the *regulatory cost* of creating new services can obtain the financial remuneration to stay in the marketplace long enough to offer commercial services and seek to make profits.

which sat on the sidelines while the pioneer cleared the regulatory path for a new service will emerge from the process debt free, and thereby better able to attract capital. Such a result is inequitable in that the party that did all the regulatory work is not only un-rewarded for its efforts, but is completely disadvantaged. The process thus actually discourages entities from undertaking the regulatory trailblazing which is necessary to bring new technologies to market.

In sum, the Commission should make clear that the pioneer's preference applies to regulatory, as well as technological trailblazers. Such rules will ensure that regulatory pioneers are rewarded for their efforts, thereby encouraging such regulatory pioneering. This approach would therefore advance the public interest by giving the American public access to new and innovative communications technologies.

III. THE PIONEER'S PREFERENCE SHOULD APPLY TO NON-MUTUALLY EXCLUSIVE SITUATIONS

Throughout these proceedings, the Commission has implicitly assumed that any service in which a pioneer's preference could be granted will be subject to competitive bidding (i.e., mutually exclusive licensing).¹⁹ While CD Radio agrees that pioneer's preferences are appropriate in mutually exclusive proceedings, it also believes that the policies in favor of preferences apply with equal or greater force for those services where

¹⁹ See, e.g., *Report and Order*, ¶ 4 ("[W]e solicited comment on whether our pioneer's preference rules continue to be appropriate in an environment of competitive bidding"). Under 47 U.S.C. § 309(j)(1), competitive bidding is permitted only when mutually exclusive applications are filed for spectrum.

mutual exclusivity is absent and licenses are not assigned via auction.²⁰ CD Radio accordingly urges the Commission to provide some regulatory reward for those pioneers that seek licenses that are not subject to competitive bidding.²¹

It is just as arduous for a pioneer to establish a new service where the applicants are not mutually exclusive as it is to create a service that will be subject to auctions. Moreover, innovation in technologies and services should be encouraged regardless of whether a new service is ultimately subject to competitive bidding. Indeed, the SDARS service -- where CD Radio's application has remained untouched for nearly five years -- is an excellent example of where a rapid designation of a pioneer could send appropriate marketplace signals.

For the aforementioned reasons, CD Radio respectfully recommends that pioneer's preferences be extended to non-mutually exclusive proceedings. Obviously, in non-mutually exclusive situations, the Commission can not offer discounted spectrum prices as it does in spectrum auctions. However, the Commission should offer other regulatory inducements, such as a "guarantee" of a license, reduced filing fees, or reduced annual licensing fees.²² It

²⁰ Under 47 U.S.C. § 309(j)(6)(E), the Commission has the authority to "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity," if the use of such authority would be "in the public interest." Further, if pioneer's preferences have not been undermined by the legislation authorizing spectrum auctions, then *a fortiori* they remain appropriate in non-auction situations.

²¹ Elsewhere, the Commission's Report and Order acknowledges both that some licenses will not be subject to auctions, *Report and Order*, ¶ 50, and that the agency has not determined to apply auctions to the satellite digital audio radio service. *Id.*, ¶ 36 n.46.

²² Under 47 U.S.C. § 158(d)(2), the Commission is statutorily empowered "to waive or defer payment" of filing fees "in any specific instance for good cause shown, where such action would promote the public interest." *See Modifying Renewal Dates* (continued...)

is only by offering such incentives that the Commission will continue to encourage technical innovation and regulatory trailblazing in non-mutually exclusive proceedings.

CD Radio submits that the important benefit of identifying a company as a "pioneer" should not be overlooked. If the identification of a company as a pioneer occurs before final licensing, the designation can, in and of itself, have important consequences. Specifically, identifying a company as an innovator and pioneer -- and guaranteeing it a license -- provides potential investors with the appropriate signals that permit more accurate assessment of regulatory risk. In effect, designation as a "pioneer" provides potential investors a "leading candidate" in a new service worthy of investigation. This marginal benefit -- if awarded early enough -- may provide an innovator with the capital needed to develop a service through commercial launch.

IV. CONCLUSION

While CD Radio agrees with the Commission that the pioneer's preference program is a valuable and necessary encouragement to technological pioneers to participate in mutually

²²(...continued)

For Certain Stations Licensed Under Part 74 of the Commission's Rules and Revising FCC Form 303-S, 9 F.C.C. Rcd 6504 (1994), in which the FCC waived application fees for certain translator and LPTV licensees that were forced by a Commission rule change to file two license renewal applications within 26 months. Similarly, under 47 U.S.C. § 159(d), the Commission "may waive, reduce, or defer payment" of a regulatory fee "in any specific instance for good cause shown, where such action would promote the public interest." *See Implementation of Section 9 of the Communications Act*, 9 F.C.C. Rcd 5333, 5344 (1994), in which the Commission determined that the waiver provision of § 159(d) was to be interpreted in the same manner as § 158(d)(2), that is, to permit "waivers only on a case-by-case basis following a demonstration that the public interest clearly overrides the private interest of the requester."

exclusive licensing proceedings, the original policies were -- and should be -- broader in scope. Specifically, the Commission's Rules should unambiguously reflect the fact that pioneer's preferences can be awarded to regulatory pioneers as well as technical pioneers in non-mutually exclusive licensing proceedings as well as services subject to auctions. By making these recommended changes, the Commission will not only make its Rules more equitable, but will continue the core policy behind the preference scheme: to foster the development of innovative technologies and services.

Respectfully submitted,

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